STATE OF MICHIGAN

SUPREME COURT

C. A. Docket No. 243489
Supreme Court No. 242645

RICHARD V. STOKAN
Plaintiff/Appellee/Cross Appellant
v.

HURON COUNTY, a Michigan Municipal Corporation
Defendant/Appellant/Cross Appellee

On Appeal from the Circuit Court
For the County of Huron
Honorable Michael P. Higgins
Case No. 99-000732-CK

126706-7

APPELLEE'S SUPPLEMENTAL BRIEF

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JURISDICTION

Plaintiff/Appellee accepts Defendant/Appellant statement of Jurisdiction.

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

A. Did the trial court err in granting Plaintiff/Appellee's Motion for summary Disposition in May of 2000?

Defendant/Appellant answers: "Yes."

Plaintiff/Appellee answers: "No."

Circuit Court answers: "No."

B. Did the trial court err in granting Plaintiff/Appellee's Motion for summary Disposition in June of 2001?

Defendant/Appellant answers: "Yes."

Plaintiff/Appellee answers: "No."

Circuit Court answers: "No."

C. Did the trial court err in failing to consider and rule on Defendant/Appellee's Motion for Reconsideration?

Defendant/Appellant answers: "Yes."

Plaintiff/Appellee answers: "No."

Circuit Court answers: "No."

D. Did the trail court err in many aspects of the trial, including, but not limited to, the fact that the jury had to consider only awarding Plaintiff/Appellee 75% or 100% of health care benefits?

Defendant/Appellant answers: "Yes."

Plaintiff/Appellee answers: "No."

Circuit Court answers: "No."

E. Did the trial court err in denying Defendant/Appellant's Motion to Set Aside the Judgment?

Defendant/Appellant answers: "Yes."

Plaintiff/Appellee answers: "No."

Circuit Court answers: "No."

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STATEMENT OF FACTS

Plaintiff accepts Defendant's statement of facts, although Plaintiff objects to the fact that they are not stated without argument or bias contrary to MCR 7.212(c)(6), except as otherwise stated herein.

Plaintiff filed an affidavit in support of his motion for partial summary disposition which established all of the following:

a. He was employed by Defendant for at least 15 years.

b. His benefits were not determined by or based on the F.O. P. (Fraternal Order of Police) contract.

c. He was employed by Defendant on March 23, 1983.

d. He was 55 years of age when he made an election to remain under Defendant's health care plan (Appendix No. 1).

Plaintiff was not forced out of office at the end of his term on December 31, 1988. Defendant does not and cannot cite any support for this slanderous statement and this is simply another flagrant violation of MCR 7.212(C)(6)

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A. STANDARD OF REVIEW

Plaintiff accepts Defendant's statement of the Standard of Review.

B. THE TRIAL COURT WAS CORRECT IN ITS INTERPRETATION OF RESOLUTION 23-83.

1. Plaintiff presented the only reasonable interpretation of the contract/resolution.

Defendant appears to have finally conceded that this is a contractual issue despite the fact that the contract is memorialized in a resolution. The cardinal rule of interpreting contracts is to ascertain the intention of the parties. ***Goodwin vs. Orson E. Coe Pontiac, Inc., 392 Mich 195 (1974).*** The construction of the terms of a contract is generally a question of law for the court to determine. ***D'Avanzo vs. Wise & Marsac, P.C., 223 Mich app 314, (1997).*** In the context of a summary disposition motion a trial court may determine the meaning of a contract only when the terms are not ambiguous. ***SSC Associates Limited Partnership vs. General Retirement Systems of the City of Detroit, 192 Mich App 360 (1981).*** A contract is ambiguous if it is susceptible to two or more reasonable interpretations. ***Petovello***

vs. Murray, 139 Mich App 639 (1984). Finally, contracts are construed most strongly against the party preparing them. ***Lichnovsky vs. Ziebert International Corp., 414 Mich 228 (1982).***

Defendant appears to argue on one hand that the language of the contract is ambiguous and the issue should have been presented to the jury and on the other hand that language is not ambiguous and summary disposition should have been entered in favor of Defendant. The trial court was correct in holding that the language was not ambiguous and that Plaintiff was entitled to partial summary disposition.

In addressing the issue of whether or not a contract is ambiguous, the appropriate inquiry to be made was succinctly stated in ***Petovello,*** supra:

> "Does there exist ambiguity within the framework of the written instrument that would require testimony to establish the intent of the parties?"

In most, if not all, of the reported cases that deal with this issue the determination of ambiguity turns on the interpretation of a particular phrase or provision contained in the contract that is subject to two or more reasonable interpretations. There was no such ambiguous phrase or provision in this case. Defendant, in effect, asked the Court to insert a phrase that provided that a retiring employee must qualify for health insurance benefits at the time of retirement from active service. Clearly the resolution contains no such language.

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The issue Defendant has had the most difficulty dealing with is establishing that the contract in question is subject to two or more **reasonable** interpretations. Defendant has filed numerous briefs in this case (five in opposition to Plaintiff's first motion for partial summary disposition alone) and Defendant has only attempted to address the issue of reasonableness once up until filing its brief on appeal. That attempt was in Defendant's first brief in opposition to Plaintiff's first motion for partial summary disposition. The argument was so devoid of common sense that it cannot be paraphrased and must be quoted:

> "Another complete leap of faith Plaintiff asks this Court to make in reaching the conclusion that the purpose of establishing minimum age requirements is because it is less expensive to insure an older person. (Plaintiff's Brief, page 6) If that were true, the entire actuarial industry would be out of business. The County wanted to reward people for long service to the County. Those that stay a certain time, retired from the County upon reaching a certain age, got benefits. Otherwise, a teenager (sic) who worked for the County on a part time basis during junior high, high school, and college, then made a career for themselves in the next 35 years, could conceivably return to the County and seek retirement benefits for the 10 years of part time service as a teenager. This surely cannot be the meaning of the resolution."

Defendant has never attempted to explain how Plaintiff posed such an imminent and catastrophic danger to the actuarial industry. Nor has Defendant ever attempted to explain the difference in cost in providing health insurance for a 55 year old retiree who worked between the ages of 40 and 55 and providing the same benefit to a retiree of the same age who worked between the

ages of 33 and 48. The reason is because this flippant remark lacks even a scintilla of substance.

Defendant next argued that its interpretation was reasonable because it sought to "reward" employees for long service to the county. This implies that these benefits were meted out at the whim and caprice of Defendant. Unfortunately for Defendant, Article IX, Section 24 of the Michigan Constitution of 1963 provides:

> "The accrued financial benefits of each pension plan and retirement plan of the state and its political subdivisions shall be a contractual obligation, thereof, which shall not be diminished or impaired thereby."

These benefits are not rewards but are rather obligations imposed on Defendant for the benefit of Plaintiff and other retirees as the result of bargaining. Even if that were not the case, Defendant's interpretation does not "reward" long service, it "rewards" advanced age. If that were not the case, why would a 60 year old with 10 years of service get the same benefits as a 55 year old with 20 years of service?

Finally, Defendant proposed the hypothetical of an employee receiving full health care benefits upon reaching age 60 for 10 years of part time service rendered over 35 years previously. Plaintiff actually made a similar argument when he sought credit for his service as a part time deputy. That part of Plaintiff's motion was denied and was eventually presented to the jury.

Defendant in its brief on appeal once again attempts to grapple with this most troublesome issue. Defendant's new position is that its interpretation is reasonable because the provision of the ordinance that provides 100% benefits for an employee who is 60 years old with 10 years service contradicts the trial court's finding that the age requirement refers to when benefits could be received and is not related to eligibility. That particular provision admittedly makes little sense when read in context with the other three. If one didn't know that one of the commissioners who voted for that resolution wanted to retire at age 60 but would only have 10 years of service, one would think it made absolutely no sense. One even has to wonder why this provision is relevant at all since it is undisputed that Plaintiff was 55 when he sought benefits and thus this provision does not affect him. However, since Defendant has raised this issue, Plaintiff must respond.

Defendant argues for this first time that this provision evidences an intent to offer an "incentive" to employees to continue working until age 60. If that is the case, one would assume that the "incentive" would be offered to all employees. What "incentive" is there to a 55 year old employee with 20 years of service? Absolutely none. What "incentive" is there to a 55 year old employee with 15 years of service? None. If that employee wants 100% benefits he has to work 5 more years and his age upon retirement is irrelevant. It seems odd that this "incentive" should apply to such a limited segment of Defendant's work force.

The term "incentive" also implies that Defendant would receive something in return for an employee continuing to work between the ages of 55 and 60. To put it another way, the work of an older employee must somehow be more valuable than an employee who is younger. Common sense indicates that is not the case. If an older employee was more valuable, why are laws against age discrimination necessary? When companies downsize, why do they offer incentives to older employees to retire? The obvious answer is that the older employee is probably less valuable and this creates no additional value for Defendant.

That is not to say that this provision might not benefit Defendant. It could be less expensive to provide 100% benefits for life to a 60 year old than 75% benefits for life to a 55 year old. That would have to be determined by actuaries (hopefully, not the ones Plaintiff will put out of business). If this turned out to be true, this benefit is accomplished by delaying the time when health insurance benefits commence from age 55 to age 60 regardless of employment status between those ages.

Since the "incentive" only applies to a small segment of employees and the implied benefit to Defendant has nothing to do with the age of an employee upon retirement but has everything to do with his age when benefits commence if this last provision has to be considered at all it certainly does not contradict the trial court's opinion.

Perhaps the most expeditious way to analyze this issue is not to ask why it is unreasonable to provide benefits to a 55 year old retired employee who previously provided 15 years of service but to ask why is it reasonable to require an employee to be 55 years old at the time of retirement to qualify for benefits? Certainly such a requirement would benefit Defendant because it would relieve Defendant of the obligation to provide health insurance benefits to Plaintiff and all similarly situated employees. The fact that Defendant would receive such a benefit does not, in and of itself, mean that this position is reasonable. By the same token, requiring that an employee be 55 at the time benefits commence regardless of retirement age benefits Plaintiff. That alone does not make Plaintiff's position reasonable. The proper analysis would be to use an "objective" or "reasonable man" standard.

It is certainly the norm in our society and economy to provide retirement benefits that vest in the employee to be received at a later date. Few people spend their entire working lives employed by the same employer. It would be patently unfair to deprive an employee of benefits earned over a lifetime simply because he was not employed on or after his 55th birthday or some other arbitrary date. This is also reasonable from an economic prospective. Employers are not typically charities. They have to amortize the retirement benefits they provide over the years of service they receive from an employee. Defendant's resolution

memorializes a business decision that if Defendant receives 15 years of service from an employee to whom the resolution applies, Defendant can pay 75% of the health insurance premium for that employee from the age of 55 until death. In making that decision one has to assume that Defendant knew the value it would receive from 15 years of service and had an appreciation for the cost of providing health insurance for a former employee from the age of 55 until death. Since no one knows how long they will live, these costs are limited and defined by earliest date they can be received by the former employee (age 55). This cost must be amortized over the 15 year service period. There is simply no logical reason why amortizing these costs over a 15 year period beginning on the former employee's 40th birthday and ending on his 55th birthday would be any different from amortizing it over a 15 year period beginning on the former employee's 39th birthday and ending on his 54th birthday as long as the first date benefits must be paid is the same.

Defendant has steadfastly refused to address these issues on anything resembling a neutral basis. All of its arguments are based on the premise that Defendant will be able to save money by avoiding the cost of these benefits for Plaintiff. The purpose of the resolution was not to save Defendant money but to define when benefits would be provided to employees. Saving money for Defendant does not equate with a reasonable interpretation of this resolution. The trial court saw through this faulty logic and held

that Plaintiff's interpretation was the only reasonable interpretation.

2. There was no genuine issue as to any material fact.

On numerous occasions throughout its brief, Defendant refers to the affidavits of Peggy Kohler, Huron County Clerk, as creating a genuine issue of material fact. The various statements contained in these affidavits that allegedly create these questions are as follows:

a. To be eligible to receive County paid retirement health benefits, a retiring employee must qualify for those benefits at the time of retirement from active service.

b. To qualify for retirement health benefits, an employee must retire from active service and, at that time elect to remain under the health insurance plan.

c. An individual not choosing to remain under the health insurance plan cannot be added at a later time.

d. Plaintiff did not retire from county service, did not elect to remain under the county health insurance plan upon leaving employment with the

county, and did not qualify for benefits under Resolution 23.83 at the time he left office.

A cursory examination of these statements reveals that they fall far short of creating a genuine issue of material fact.

MCR 2.119(B) requires that an affidavit filed in support of or in opposition to a motion must:

1. be made on personal knowledge;
2. state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
3. show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

For purposes of this inquiry the most important requirement of this rule is that the affidavit must state with particularity facts admissible as evidence establishing or denying the grounds for the motion.

Items a, b, and c cited above do not contain facts denying the grounds stated in the motion. At most, they are self-serving statements of Defendant's policy with respect to this resolution. Unless the resolution is first determined to be ambiguous, Defendant's policies are totally irrelevant.

Item d comes a little closer to meeting this requirement. Peggy Kohler first states that Plaintiff did not retire. Is she saying that Plaintiff is still employed by the county? Since there

has never been a dispute about when Plaintiff left Defendant's employ this is obviously not what she meant and is thus nothing more than another statement regarding Defendant's policy on retirement. The next statement, that Plaintiff did not elect to remain under the health care plan when he left Defendant's employment, is a statement of fact. Unfortunately, it wasn't a contested fact. Plaintiff conceded he did not make an election when he left office because he was not then 55 years old. The last statement, that Plaintiff did not qualify for benefits at the time he left office, is neither a statement of fact nor is it contested. If Plaintiff felt he was entitled to benefits when he left office, he would not have waited over six years to apply for them. Even if that was not the case, this is nothing more than a statement of Defendant's policy.

Despite the number of affidavits that Defendant filed in opposition to Plaintiff's motions, Defendant never raised a genuine issue of any material fact. All issues raised by those affidavits were either statements of Defendant's policy which were not relevant or facts which were not contested. Thus, there was no genuine issue as to any material fact and the trial court was correct in granting Plaintiff partial summary disposition.

C. THE RESOLUTION DID NOT CONTAIN ANY LANGUAGE THAT REQUIRED THAT PLAINTIFF HAD TO BE 55 WHEN HE CEASED EMPLOYMENT WITH DEFENDANT TO QUALIFY FOR HEALTH INSURANCE BENEFITS.

In the Court of Appeals Defendant for the first time cited the unpublished opinion in ***Douglas v City of Saline, Court of Appeals No. 185668*** for the proposition that the Plaintiff does not qualify for benefits under resolution 23-83. What this case actually demonstrates is that if Defendant could have convinced its employees to accept a contract like the one spelled out in ***Douglas*** and if Defendant had carefully drafted the language of the resolution like the City of Saline did Defendant would be the prevailing party. In other words, the resolution in ***Douglas*** reads like Defendant wishes resolution 23-83 read.

Douglas contains two absolutely unequivocal requirements to receive the benefits in question which Mr. Douglas failed to meet. That does not mean, however, that Defendant's resolution contains the same requirements. The first is that the employee must "....have reached the age of fifty-five (55) years as of the date of such retirement..." That phrase, as drafted, has one meaning and one meaning only. The employee must be at least 55 on the day he or she retires.

Defendant seizes upon two phrases in resolution 23-83 as meaning the same thing. The first is:

> "....upon retirement from county service after the date of this resolution as follows, if an election is made by them to remain under said plan."

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Clearly, that is not the case. This phrase does not mention any age at all let alone the age of 55. It simply lists 3 requirements that must be met before an employee is eligible:

1. The employee must retire;
2. The retirement must be after the date of this resolution;
3. An election must be made to remain under the plan.

No tortured definitions or interpretations employed by Defendant can insert the age of 55 into this phrase as an additional requirement.

The second relevant phrase, which actually refers to the age of 55, provides:

> "The County of Huron shall pay 75% of such premium for such retired employee having at least 15 years of service with the County and being of the age of 55 or older."

Unlike the resolution in ***Douglas***, this does not even mention the employee's age upon retirement let alone provide that the employee must be 55 upon retirement. The Plaintiff asked the trial court, and now asks this court, to insert language into the contract so it reads like ***Douglas*** and means what Defendant hopes.

The second alleged similarity that Defendant cites between the ***Douglas*** resolution and resolution 23-83 is actually a contradiction. The ***Douglas*** resolution provides:

> "All city employees... shall continue to receive full payment by the county of the premiums for their medical and life insurance coverage in effect on the date of such retirement."

The Court of Appeals in ***Douglas*** found that since the resolution clearly defined the age of retirement to be no less than 55 and limited coverage to that which was in effect upon retirement, Mr. Douglas was not entitled to benefits because no benefits were in effect when he was 55. Although this provision was used as a sword to prevent Mr. Douglas from receiving benefits, under other circumstances it could have been used as a sword against the City of Saline.

Had Mr. Douglas qualified for benefits, he would have received the health care coverage in effect on the date he retired for the rest of his life. If the City suffered financial problems and was forced to reduce the level of health and life insurance provided to employees, this resolution would have prohibited it from reducing Mr. Douglas' benefits. This fact is not particularly relevant other than to illustrate the great difference between the ***Douglas*** resolution and the resolution 23-83.

Rather than freezing the retiree's benefits as of the date of retirement, Defendant employed language which potentially could allow it to change, and probably reduce, a retiree's benefits. Defendant reserved that option by using the following language:

> "Be It Further Resolved, that the premiums for the county employee health care benefit plan, ***as it may be constituted from time to time...***" (EMPHASIS SUPPLIED)

If Defendant was forced to reduce health care benefits for current employees by increasing deductibles and co-pays or reducing coverage, those reductions would unquestionably apply to Plaintiff. It is, therefore, clear that the City of Saline sought to freeze benefits for all purposes at the date of retirement while Defendant sought to retain the right to alter those benefits. This dramatically underscores the difference in the approaches employed by these two municipalities and it also underscores the reasons that ***Douglas*** cannot be cited as controlling precedent for the case at bar.

Finally, Defendant seizes upon a single word contained in resolution 23-83 as support for its position. That word is "remain". Defendant claims the term ". . . if an election is made by them to remain under such plan" means the same as the following language from the resolution in ***Douglas***:

> "All city employees . . . shall continue to receive full payment by the city of the premiums for their medicaid and life insurance coverage in effect on the date of such retirement."

By no stretch of the imagination are these phrases equivalent.

In ***Douglas***, the employee received the health and life insurance coverage that was in effect at the date of their retirement. Since previous language limited retirement to an age not less than 55, this means the insurance would have to have been in effect on or after the employee's 55th birthday. There is nothing

in the ***Douglas*** resolution that required the employee to make an election on the date he retired. Conceivably, former chief Douglas could have retired at age 55, taken employment with another agency with health and life insurance benefits which were superior to those offered by the city. He could have accepted those benefits thus relieving the city of that financial burden. At age 65 he could have retired from the second employer and applied with the city to receive the health and life insurance coverage in effect on the date of his first retirement. There is no language in the ***Douglas*** resolution that required that an election be made at the date of retirement and the former chief would have been entitled to those benefits.

Resolution 23-83 also contains no language indicating that the election to "remain under such plan" must be made on the date of retirement. One would wonder if the Defendant were faced with the previous hypothetical whether it would complain that it was somehow wronged by the former employee taking advantage of coverage offered by a subsequent employer and relieving it of its financial responsibility.

Perhaps the most compelling argument on this issue is the one that Defendant has carefully avoided. On numerous occasions Defendant has cited language in the affidavit of Peggy Koehler:

> "Any individual not choosing to remain under the health insurance plan upon retirement **cannot** not (sic) be added on at a later time." (EMPHASIS SUPPLIED)

Why can't this happen? What legally or physically prevents Defendant from adding Plaintiff to its plan? Was there something contained in the contract between Defendant and its health insurance carrier that prevented subsequent reinstatement? The answer to all of these questions is a resounding "no". After the trial court entered its Order For Partial Summary Disposition on June 15, 2001 (Appendix 2), Defendant re-enrolled Plaintiff in its health insurance plan. Obviously, this re-enrollment was not an impossible task and Defendant was simply attempting to mislead the court by implying that it was.

One has to wonder what Defendant's position would be if Plaintiff was covered by health insurance through his spouse's employer and elected to save Defendant money by relying on that coverage alone. Would he be prohibited from receiving these benefits after retirement if he retired on his 55th birthday without being covered while employed? He obviously could not make an election to "remain" covered because he was not covered in the first place. What is it about remaining covered that is so important or beneficial to Defendant? Or is Defendant simply seizing upon some fortuitous language to deny Plaintiff benefits he earned without employing language that makes it clear that he would suffer that consequence?

Defendant's interpretation of resolution 23-83 might be reasonable if it suffered some penalty or detriment as a result of an hiatus in coverage such as a substantially increased premium.

Defendant never even implied that this was the case let alone offer any proofs on that issue. For employers like Defendant, the cost of insuring one 55 year old is the same as insuring any other 55 year old. Defendant is simply attempting to exalt a perceived form over actual substance to deny Plaintiff the benefits for which he bargained and which he earned.

CONCLUSION AND RELIEF SOUGHT

Defendant has failed to cite any language in resolution 23-83 that provides that Plaintiff had to be 55 at the time he retired and, at that time, had to make an election to remain on the Defendant's health care plan. Defendant has failed to set forth any logical argument supporting its position that it is reasonable for Defendant to take advantage of 16 years of Plaintiff's services and yet deny him the benefits those services earned. Defendant has failed to explain why it will suffer any increased burden by now providing those benefits as opposed to providing them if Plaintiff retired at the age of 55. In short, Defendant has failed to show why its interpretation of this contract is reasonable. For these reasons, the trial court was correct in granting summary disposition on the issue of liability. Court of Appeals was correct in affirming the trial court and Defendant's application for leave to appeal should be denied.

WHEREFORE, Plaintiff prays that this Honorable Court deny Defendant's application for leave to appeal.

Respectfully Submitted,

Dated: April 21, 2005

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